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Office-Supreme Court, U.S.
FILED
MAR 18 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 704

T. LAMAR CAUDLE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

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The brief for the United States in opposition to the petition serves only (1) to highlight the importance of the questions presented in the petition and (2) to compound the confusion and conflict surrounding those questions.

Significantly, the United States at no point in its brief states what it believes to be the proper standard for reviewing the impact on a new trial of newly discovered evidence. Reference is there made to the "probable acquittal" version only in terms of petitioner's criticism thereof and in terms of that version representing "the very great weight of authority" in

the lower federal and state courts. Brief, p. 18.[1] But the Government does not affirmatively adopt or urge this formulation of the standard. Nor does the Government deny the fact (Petition, pp. 18-22) that there are at least four different versions of this criterion and that this Court has never adopted or approved any of those four as enunciated in the lower courts. The conflicting formulations and meanings must stand as conceded.

Moreover, the Government does not and cannot deny that a patent conflict exists between the various rules applied in the lower courts, including the "probable acquittal" version, and this Court's statement in *Griffin* v. *United States*, 336 U.S. 704, 709, that the new trial motion was there to be tested by whether it would be too dogmatic for a court to conclude "that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it." The Government now speculates (Brief, pp. 17-18) that this Court did not intend to apply that formulation to all motions for new trial and that the Court was doing no more than "disposing of the capital case before it."

But the absence of any limiting conditions on the *Griffin* language, especially in light of the considerations put before the Court, makes it inappropriate to

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[1] Also significant is the fact that the Government, in restating the rule of the lower federal courts, speaks not of the probability of "acquittal" but of the probability of "a different verdict." Brief, p. 18, note 5. And see Petition, p. 20, note 14. Moreover, one of the cases cited by the Government, *Heald* v. *United States*, 175 F. 2d 878, 883-4 (C.A. 10), also refers to the probability of a "different result" rather than of an "acquittal." As noted in the Petition, p. 20, that difference between an "acquittal" and a "different verdict or result" can be vital.

distinguish the case on such speculative grounds. The Court was there made fully aware of what the Government thought was the prevailing formulation in the lower federal and state courts. And the Government frankly made a significant concession that such a formulation was too harsh "where the offense in question is of a serious type, and particularly in a capital case." (See Petition, p. 16). If the Court had wished to approve one of the lower court versions or to accept the Government's suggested modification, or to limit its own formulation to capital cases, it could easily have done so. But the Court did none of those things. The *Griffin* criterion was knowingly established by this Court and if any limitations are now to be made as to non-capital cases only this Court can do so. The instant case thus affords an opportunity to study and clarify this clear conflict.

In avoiding a commitment on the proper standard, the Government relies heavily on *United States* v. *Johnson*, 327 U.S. 106. That case narrowly circumscribed appellate review of a District Court's findings on conflicting evidence relative to a new trial motion, at least where the judge dealing with the motion also presided at the original trial. But that case is no answer to petitioner's complaint that the District Court in the instant case, in making its findings, applied a standard which is improper, confusing and unapproved by this Court. To make findings in light of such an improper and uncertain test is manifestly an error of law and therefore outside the scope of the *Johnson* case.

The Government asserts, however, that there is no occasion here for the Court to determine whether the criterion used below is appropriate for all motions for a new trial based on newly discovered evidence. Brief, p. 16. But the three reasons advanced in support of

that assertion reflect a distortion both of the record and of petitioner's contentions:

(1) Contrary to the Government's statement, petitioner did not frame the issue in his motion in the District Court in terms which he now criticizes the court for restating in his own terms. Petitioner's motion (R. 51) merely sought to summarize the nature of the newly discovered evidence and alleged that if the Schwimmer testimony had been before the court and jury at the original trial—in contrast to a new trial—"he should have won an acquittal and been acquitted and been exonerated by the Court and jury instead of convicted."[2] That assertion was accompanied by an argument in the supporting brief (R. 384) that a sharp distinction was to be drawn between the use of the five verities mentioned in *Johnson v. United States*, 32 F. 2d 127, 130 (C.A. 8)—including the "probable acquittal" rule—and the use of the standard mentioned in *Pettine* v. *Territory of New Mexico*, 201 Fed. 489 (C.A. 8), relative to new evidence tending to prove that evidence given at the original trial was false and misleading.[3] The argument was made that since Schwimmer's testimony tended to prove false the im-

[2] Petitioner's motion also alleged (R. 51) that the evidence introduced at the trial without explanation "when explained by Schwimmer, the only person who knew the explanation, would have strongly tended to exonerate the defendant from the implications and inferences upon which the verdict of guilty depended."

[3] The *Pettine* rule is essentially the rule applied in the more recent recantation cases. There the "probable acquittal" rule is abandoned and attention is focused on the possibility that without the false testimony the jury at the original trial might have reached a different conclusion. See Petition, p. 21. Petitioner thus contended for a standard which in every vital respect—looking backward instead of forward; and dealing with a possibility rather than a probability—differed from the "probable acquittal" impact on a new trial emphasized by the District Court.

plications drawn from his unsworn letters and statements introduced at the trial the *Pettine* rule rather than the *Johnson* verities should be applied. Petitioner focused attention on the impact of the new evidence on the *original* trial rather than on the *new* trial should one be granted.

Petitioner's contention in the District Court thus differed materially from the standard applied by the court, a standard which ignored the possibility of a different result ensuing at the original trial and concentrated instead on the probability of an acquittal resulting on a new trial. And that contention was renewed by petitioner in the Court of Appeals, accompanied by an argument that the "probable acquittal" standard adopted by the District Court was too "high" and was "in conflict with other decisions of this court and in conflict with decisions from other circuit courts."[4]

(2) The Government's assertion that Judge Nordbye's "ultimate conclusion" and the "entire tone" of his opinion went beyond the "probable acquittal" rule and met "the loosest standard" for which petitioner now contends is utterly baseless. The so-called ultimate conclusion—that to Judge Nordbye it seemed "inconceivable that the additional evidence of the one who spawned the plan and scheme to corrupt government officials could have any weight in producing a verdict other than that which was returned by the jury"—is justified by none of the known standards, loose or otherwise. All of those standards concentrate on the possibility or probability of the *substance* of the new evidence having some sort of impact. But Judge Nordbye, as well as the Court of Appeals and the Gov-

[4] Petitioner's brief in Court of Appeals, p. 31.

ernment before this Court, ignored in large part the *substance* of Schwimmer's new testimony and focused instead upon his venal nature and his position as "the one who spawned the plan and scheme to corrupt government officials." Far from satisfying any of the standards, such a personalized assault upon the credibility of a witness invades the function of the jury and constitutes an abuse of discretion. See Petition, pp. 25-27.

(3) The final contention of the Government that the "possible difference in criteria applied by different courts" mainly has significance where an important Government witness has allegedly perjured himself at the trial overlooks the fact that petitioner has consistently maintained that the rule in the recantation cases—the "might have reached a different conclusion" version—is applicable in the instant case. While no Government witness has here recanted, the critical documents used at the trial—the unsworn letters and records of Schwimmer—have now been explained and the inferences drawn therefrom to support the conviction have been shown to be false. The documents in a real sense have recanted. That is reason enough to apply the recantation standard as to a new trial motion.

The Government's frontal assault (Brief, pp. 22-23) upon the reliability and credibility of Schwimmer, found by the District Court to be a competent witness, constitutes an abject repudiation of one who in effect was the main support of the Government's case. The conviction concededly rested upon the inferences and conclusions to be drawn from the unsworn and unexplained statements, letters and records of Schwimmer—this "admitted perjurer", this spawner of "a plan to corrupt government officials", this poisoner of "the minds of a jury against petitioners". The Govern-

ment now asserts that his unreliability is obvious. But the Government blandly ignores the impact of that asserted unreliability upon Schwimmer's documentary evidence. Is that not equally incredible and unbelievable, particularly when the evidence is used to support the conviction of persons other than Schwimmer himself?

In short, the Government has undermined the very basis of its own case. The critical evidence upon which the conviction rested has been tainted by Schwimmer's venal character. And it has been proved false by his new admissions against his own interest.[5]

For these reasons, as well as those expressed in the petition for a writ of certiorari, the writ should issue.

Respectfully submitted,

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[5] Far from being incriminatory of petitioner (Govt. Brief, p. 21), Schwimmer's new testimony tends to exculpate petitioner and to confirm completely petitioner's own trial testimony. See Petition, pp. 9-11.